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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 137

BEARD-LANEY, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND ASSOCIATED PETROLEUM CARRIERS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

MOTION OF ASSOCIATED PETROLEUM CARRIERS TO AFFIRM

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

Civil Action No. 2048

BEARD-LANEY, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND ASSOCIATED PETROLEUM CARRIERS,

Defendants

MOTION OF ASSOCIATED PETROLEUM CARRIERS TO AFFIRM

Associated Petroleum Carriers, one of the defendant-appellees, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, moves that the judgment and decree of the District Court be affirmed.

This is a direct appeal from the final judgment and decree of a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of Oct. 22, 1913 dismissing appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. Findings of fact and conclusions of law, and the judgment and decree of the court, were entered on March 9, 1949, and appeal papers were served on April 29, 1949.

This movant adopts the statement of facts and the reasoning and argument contained in a similar motion which is being made simultaneously by the Interstate Commerce Commission, defendant-appellee, and, in addition thereto, respectfully submits the following arguments:

We submit herewith our analysis of the assignments of error filed by the appellant for the purpose of showing that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument as authorized by Rule 7(4).

Assignments Nos. 1, 2, 9 and 10

All of these assignments are pointed toward the contention that the Commission and the Court below did not make the basic findings necessary for their ultimate finding of convenience and necessity, and that none of their findings is supported by substantial evidence and hence the decision is arbitrary and unreasonable.

In answer to this contention we list the following as being among the many basic findings of the Commission and the Court below that do support the ultimate finding of convenience and necessity:

> The Commission found that "many of the larger oil companies have storage tanks at some of the pipeline outlets, but none has storage facilities at all of the outlets . . . and in many instances (gasoline of such oil companies) will not be available at the nearest outlet."
>
> The Commission went carefully into the problem of the quantity of gasoline transported in the territory under consideration, and pointed out that during the year ended May 31, 1945, WECA had transported over 77,000,000 gallons from Savannah, over 65,000,000 gallons from Wilmington and over 23,000,000 gallons from Charleston.

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The Commission found that one of the shippers in the territory under consideration would, in all likelihood, distribute 2,000,000 gallons of gasoline per month.

The Commission found that during the six-week period immediately preceding the hearing WECA transported more than 39,000,000 gallons of gasoline.

In its first decision the Commission found that WECA transported more than 350,000,000 gallons of gasoline during the twelve months preceding May 31, 1945.

The Commission found that "no common carrier service is shown to be available to serve the entire territory in which a definite need for service is established by shipper witnesses, nor is it shown that existing carriers can absorb the substantial tonnage transported by WECA in the territory involved."

The Commission found that only five of the protestants have certificates of public convenience and necessity authorizing operations within a part of the territory here involved.

The Commission analyzed the authority of these common carriers as well as their equipment, and whether or not they could perform additional service, and concluded that the protestants had neither the authority nor the equipment to meet all of the needs of the territory involved.

The Commission found that none of the existing carriers in this territory that had the capacity to handle additional traffic were authorized to operate from the following key points: Charleston, Morehead City, New Bern or Brunswick, or any of the pipeline terminals on the Plantation pipeline, except that one had limited authority to operate from Thrift and Camp Croft.

The foregoing are only a few of the basic facts that the Commission found. An examination of the opinions of the Commission and the Court will show that ample basic

facts were found to meet the requirements of the decisions of this court.

Included in the above assignments of error is the contention that the findings of the Commission are not supported by substantial evidence. We respectfully submit that, on the contrary, there was ample evidence to support all of the Commission's findings. It would be tedious beyond words for us to thread through the enormous record and multiplicity of exhibits in this case and show how completely the Commission's basic findings are supported by evidence. A few illustrations will suffice:

> The Commission's opinion is full of facts and figures regarding the quantity of petroleum products hauled from various ports and pipeline terminals. Obviously the Commission did not imagine these facts; these facts were clearly proven by evidence that was duly presented.
>
> In its opinion the Commission specifies facts regarding various shippers, and the experience of these shippers is gone into in detail. Reference to the record will show that these shippers, and others associated with them, testified to the facts which the Commission found.
>
> At one point the Commission says that operators of bulk plants, gasoline filling stations, bus line operators and other large consumers of petroleum products located generally throughout the area supported the application. Obviously this finding is based upon the testimony of these operators of bulk plants, gasoline filling stations, bus lines and the other consumers.
>
> The Commission found that few of the receivers of petroleum products supporting the application have storage facilities of sufficient size to accommodate carload shipments. An examination of the record shows that these receivers of petroleum products gave ample testimony to this effect.

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The operating authority of each protestant was placed in evidence by means of exhibits. On this point there were eleven exhibits in all.

The Commission found the exact number of tractor-trailer tank trucks that were being operated by the three principal common carrier protestants in this area. The record shows that this number of tractor-trailer tank trucks was not dreamed up by the Commission, but the finding was based upon direct evidence.

At one point the Commission says that a witness "expressed the opinion that it would be necessary for them (his firm) to purchase a large fleet of trucks to handle their business in the event the service proposed by applicant was not available." Obviously this witness testified.

The above are only a few instances of the many that we could point out where the findings of the Commission are necessarily based upon substantial evidence. In other words, the opinion of the Commission itself contains ample internal evidence of the unsubstantiality of the plaintiff's contention.

Assignment No. 3

This assignment is unsubstantial because it does not take account of the authority of the Commission in such cases as was so well stated in *Virginia Stage Lines* v. *United States*, 48 Fed. Supp. 79, as follows:

> "This is in accord with the realization that the regulation of transportation involves various economic factors and the exercise of an empirical judgment since the stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being

responsive to the dynamic character of transportation problems."

Assignments Nos. 4 and 5

These are blanket assignments of error and are not sufficiently definite to enable either the court or the appellees to understand what the appellants have in mind.

Assignments Nos. 6 and 7

These assignments of error are so unsubstantial as to come within the classification of frivolous. The Court below, in recounting the facts and the procedural history of the case, mentioned merely in passing, at the end of the second paragraph, that only one of the original fourteen motor carrier protestants had brought this action, and in that connection pointed out that the appellant had a license to transport from only seven of the twenty-six points of origin within the territory. Those statements do not appear anywhere else in the opinion and do not appear to have been the basis of the Court's decision.

Assignment No. 8

In this assignment of error the appellant complains that in its discussion of the case the Court below referred to the findings of the Joint Board, claiming that in the procedural set-up for cases of this sort established by Congress the Joint Board is merely an inanimate "conduit." We respectfully submit that the appellant underrates the importance of the Joint Board. It is clear that in cases of this sort Congress has called on the Utilities Commissions of the States involved in pursuance of the policy of decentralization of governmental affairs which has proven so wise. In the case at bar the Joint Board that heard the testimony of the witnesses was a blue ribbon joint board, composed of commissioners themselves (not repre-

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sentatives of the Commissions) of North and South Carolina and Georgia. It is a matter of great gratification to this movant that these eminent men, charged with the serious responsibility of administering to the needs of the citizens of the three States involved, found for the applicant. In this connection, it is worth noting that the Utilities Commission of each of the three States involved has awarded to the applicant intrastate authority to perform within the borders of the respective States this service which the Commission's opinion authorizes it to perform.

It is a part of the National Transportation Policy (Title 49, U. S. Code, just ahead of section 1) that it is the policy of Congress "to cooperate with the several states and the duly authorized officials thereof". We submit that it is in line, therefore, with the National Transportation Policy for the Commission and the Courts to take serious note of what the Joint Board said.

Assignment No. 11

Candidly, it seems to us that this assignment of error is, from a legal standpoint, utterly meaningless. Apparently the appellant did not like the Commission's opinion and does not like the Court's opinion, and uses this assignment of error to express its dislike.

Assignment No. 12

This assignment of error seems to say that there was no reason for the Court below to find that the documentary evidence showed the limit of authority of the protestants when, according to the appellant, the Commission failed to find that an actual need for service existed "from any or all points of origin to any or all points of the destination territory". The difficulty with the appellant's position is that the Commission did expressly find that such

an actual need existed. As a matter of fact, sheets 3 through 7 of its last opinion are devoted to the single and solitary purpose of showing the existence of this need.

Furthermore, we call attention to the fact that the statement of the Court below regarding the documentary evidence is a part of an entire paragraph which should be considered as a unit, and which is as follows:

> "There can be no question that the evidence before the Commission amply supports its findings. Witness after witness testified as to the need for the service; documentary evidence shows that the operating authority of the protesting carriers is so limited that they cannot serve the territory allotted to applicant; and the fact that WECA is now handling such a large portion of the traffic is sufficient basis for the finding that the substitution of applicant in its place will not result in competition hurtful to the public interest."

Assignment No. 13

The exact finding of the Commission in the second and third paragraphs beginning on sheet 7 of its Feb. 19, 1948 decision is:

> "It does not appear that the present competitive relation as it now exists between WECA and protestants would be materially changed by applicant entering the field in place of WECA. . . . The record is replete with evidence that WECA has been supplying a service upon which the shipping public relies and that this service cannot be withdrawn through denial of this application without detriment to the shipping public."

WECA has admittedly been in operation ever since the Spring of 1942, which means that it has been in operation for almost seven years. There is no evidence that its competition has driven the appellant out of business or unduly prejudiced it. As a matter of fact, all of the fifteen original

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protestants before the ICC are still in business and there is no evidence that any of them has been unduly prejudiced by WECA's operation.

As a matter of fact, the record shows that WECA is the only common carrier of petroleum in this territory that actually serves the public generally. The record shows that most of the principal protestants devote practically their entire equipment to servicing the big oil companies. For example, the appellant devotes most of its services and equipment to Standard Oil Company of New Jersey and the Gulf Oil Company.

Assignment No. 14

By this assignment of error the appellant asserts that the Commission made no finding that there would be any interstate business relinquished by WECA, that the Commission made no finding that the public needed the services of the applicant in place of WECA and, therefore, the appellant contends the Court below was in error in finding that it would be in the interest of the public for the applicant to have a chance at taking over the business now handled by WECA. We submit that this assignment of error is a conglomerate of error itself.

Obviously the Commission did make a finding that interstate business would be relinquished by WECA when it goes out of business because the Commission goes to great lengths to show the amount of gallonage interstate that WECA is now transporting. It would seem to be plain beyond the necessity of argument that if WECA is now transporting enormous quantities of petroleum in interstate commerce, such business will be relinquished when WECA ceases to exist.

Equally fallacious is the appellant's contention that the Commission did not find that the public needs the appli-

cant as a substitute for WECA. As pointed out above, sheets 3 through 7 of the Commission's last opinion are devoted to showing the existence of this need.

The Court was clearly on sound ground to hold that it was within the power of the Commission to give the applicant a chance at getting the business that would be relinquished by WECA under all the facts and circumstances of this case.

Assignment No. 15

This assignment of error also properly comes within the classification of being frivolous. In discussing the procedural history of the case, the Court naturally pointed out that the Commission had reheard its first decision and reversed itself. The Court below, being well acquainted with the habits of judicial and quasi-judicial bodies, took judicial notice of the fact apparently that whenever any judicial or quasi-judicial body reverses itself, it does so only after giving the matter most serious consideration. Furthermore, it was not necessary for the court below to point out why the Commission, in its second opinion, reversed its first opinion.

Assignment No. 16

The appellant clearly misconceives both the language and the meaning of the National Transportation Policy. As we read the National Transportation Policy it contains nothing to support the appellant's contention that competition among carriers shall be kept to the minimum. The only language in the National Transportation Policy that could, by any sort of stretch of the imagination, be considered to relate to competition is that part which says that it is the policy of Congress "to promote safe, adequate, economical and efficient service and foster sound

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economic conditions in transportation and among the several carriers."

The Commission recognized that there would be competition among the various carriers in this territory, which would, of course, include competition between the applicant and the other carriers. There is no finding, however, and, as a matter of fact, no evidence to support a finding that sound economic conditions in transportation will not be promoted by the continuance in this territory of the WECA operation which has proven so helpful for seven years.

Also in discussing the National Transportation Policy the appellant seems to overlook the concluding words which are to the effect that everything in the National Transportation Policy shall look toward the establishment and maintenance of transportation "adequate to meet the needs of the commerce of the United States." No one can read the opinion of the Commission or the Court and conclude other than that both the Commission and the Court have found that by granting the applicant's petition for franchise there will be provided within the territory under consideration petroleum carrier service adequate to meet the needs of the commerce involved.

Assignments Nos. 17 and 21

These two assignments of error relate to a fragment of one sentence which the appellant has torn from its context and which it now uses as the basis of these assignments of error. The Court will find the sentence in question in the second paragraph that commences on sheet 7 of the Commission's last decision. The whole sentence reads as follows:

> "Generally speaking, there is no claim by anyone that a new service is now needed, but the record is

replete with evidence that WECA has been supplying a service upon which shipping public relies and that this service cannot be withdrawn, through denial of this application, without detriment to the shipping public."

Obviously the "new service" that the Commission refers to is some new service in addition to the service that WECA has been performing. The Commission, in this sentence, is considering the WECA service as an old established service, and says that no new service, in addition to that old established WECA service, is needed. It appears to us that the appellant, by taking from this sentence a portion thereof, is trying to torture the language of the Commission in meaning something that the Commission clearly did not intend.

Assignments Nos. 18, 19 and 20

The unsubstantiality of these assignments of error is clearly demonstrated by the Court's opinion. The whole matter as to whether or not the commodities clause, or anything like it, is applicable to motor carriers was discussed in *U. S.* v. *South Buffalo Railroad Co.*, 337 U. S. 371. Especially see Note 10 on page 790.

In view of the foregoing, the appellee, Associated Petroleum Carriers, respectfully submits that the decree of the District Court should be affirmed on this motion.

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May 12, 1949.

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